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No. 90-1201

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

H. PAUL LILLEBO, et al.,

Petitioners,

v.

GRAY DAVIS, in his capacity as the Controller of the State of California, and CALIFORNIA STATE EMPLOYEES' ASSOCIATION,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, as construed by the California courts, the provisions of California Government Code section 3515.8 for the expenditure of fair share fees, on their face, violate the First Amendment right of freedom of association of objecting nonmember employees.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Gray Davis, Controller of the State of California, hereby submits opposition to the petition for a writ of certiorari, which seeks review of the decision of the Court of Appeal of the State of California for the Third Appellate District in this case.

STATEMENT OF THE CASE

A. Summary of Material Facts

The Dills Act, California Government Code[1] section 3512 et seq., provides the framework for collective bargaining and employee-employer relations for state employees in California. The Act divides employees into bargaining units represented by exclusive employee organizations or unions.

To defray union costs for representing employees who are not union members, in 1982, effective January 1, 1983, the California Legislature amended section 3515.7, subdivision a, to provide that "[o]nce an employee organization is recognized as the exclusive representative of an appropriate unit, it may enter into an agreement with the state employer providing for organizational security

[1] Unless otherwise indicated, all section references are to the California Government code.

in the form of maintenance of membership or fair share fee[2] deduction."

Respondent Gray Davis, State Controller of California, on behalf of the State as employer, is authorized to deduct the fair share fees from the salary or wages of state employees who are not members of the union (§ 3515.7 (b)).

To assist employees in this process, the Dills Act requires employee organizations to keep "an adequate itemized record of [their] financial transactions" and to make available to the California Public Employment Relations Board (hereinafter "PERB") and to employees a "a detailed written financial report" annually (§ 3515.7 (e)).

Non-member employees have the right to demand and receive from unions a return of any part of their fair share fees which is spent "either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied towards the cost of any other benefits available only to members of the recognized employee organization" (§ 3515.8).

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[2] For purposes of the Dills Act," . . . 'Fair share fee' means the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization. The fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization." Section 3513(k).

Section 3518.8 further provides that the refund shall not reflect or include:

> " . . . the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer. The [PERB] may compel the recognized employee organization to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section."

The petitioners in this action are state employees and fair share fee payers who allege that the fair share provisions of the Dills Act unconstitutionally impinge on their First Amendment right of freedom of association. Respondent CSEA is a recognized employee organization receiving fair share fees.

B. Summary of Procedural History

On May 2, 1983, plaintiffs filed a complaint for declaratory and injunctive relief and damages against the California State Employees Association (hereinafter "CSEA") and the State Controller. On December 11, 1986, with leave of the court, the plaintiffs filed a second amended complaint. Defendants then answered the second amended complaint. Between January 6, 1988, and February 1, 1988, the parties filed cross-motions for summary judgment. On May 31, 1988, the superior court filed an order granting CSEA's motions and denying those of

plaintiffs. On July 6, 1988, defendant CSEA moved for reconsideration of a portion of the court's order.

On June 21, 1988, in response to CSEA's motion for reconsideration, the trial court filed its final order on the cross-motions for summary judgment or summary adjudication.

On October 28, 1988, plaintiffs filed a partial dismissal of the "as applied" issues referenced in paragraphs 4 and 5 of the June 21, 1988 order of the court and of the third cause of action of the second amended complaint.

On December 15, 1988, judgment was entered in favor of defendants consistent with the partial dismissal of plaintiffs and the court's June 21, 1988 order.

Petitioners appealed to the California Court of Appeal for the Third Appellate District which affirmed the judgment of the trial court on March 23, 1990. The petitioners then sought a rehearing which was denied on April 17, 1990. Thereafter petitioners filed a petition for review which was granted by the California Supreme Court on June 29, 1990. That court then transferred the matter back to the Court of Appeal with directions to vacate its decision and reconsider the matter in light of *Keller v. State Bar of California*, 495 U.S. ___, 110 L. Ed. 2d 1 (1990). The Court of Appeal "reissued" its opinion on August 20, 1990, finding the statutes at issue were not facially unconstitutional.

On September 27, 1990, petitioners sought review in the California Supreme Court. Review was denied on October 30, 1990.

REASONS WHY THE WRIT SHOULD BE DENIED

I

AS INTERPRETED BY THE CALIFORNIA COURT OF APPEAL, THE FAIR SHARE FEE PROVISIONS OF THE DILLS ACT ARE FACIALLY CONSTITUTIONAL

Petitioners are requesting this court to review state court proceedings where they chose to limit their challenge to the fair share fee provisions of the Dills Act to the constitutionality of the provisions "on their face". However, in their petition they fail to acknowledge that their appeal in the state courts was limited to the facial validity of the Dills Act, and instead they argue that the decision of the California Court of Appeal allows the use of agency shop fees for matters not germane to collective bargaining, and they raise the specter of the corrosive impact public employee unions will have on the political process with their treasuries loaded with agency shop fees which will be used for ideological lobbying. In making these arguments, petitioners fail to acknowledge that, in considering a challenge to the facial validity of the Dills Act, the lower court was under an obligation to construe the statute, if at all possible, in a manner favoring its constitutionality, and was foreclosed from considering the actual application of the statute.

When the facial constitutionality of a statute is challenged, the courts first ascertain whether the statute can be reasonably construed to avoid the constitutional difficulty. *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks, etc.*, 466 U.S. 435, at 444 (1984).

> "It is well established that the courts will not invalidate a statute on its face simply because it **may** be applied unconstitutionally, but only if it

> cannot be applied consistently with the Constitution. Thus in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 722 (1984), the Supreme Court explained there are two different contexts in which a statute may be declared facially invalid: 'either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad"' (*Id.* at 796, 104 S.Ct. at 2124. A holding that invalidates a statute in the first situation 'expresses the conclusion that the statute could never be applied in a valid manner' *Id.* at 797-98, 104 S.Ct. at 2125 . . . " *Robinson v. State of New Jersey* (II) 806 F.2d 442, at 446-47 (3rd Cir. 1986).[3]

Petitioners' chief complaint is with the provisions of section 3515.8 of the Dills Act which allow fair share fees to be used for limited lobbying activities. As construed by the Court of Appeal these provisions allow for the use of fair share fees to defray:

> " . . . the costs of support of lobbying activities designed to foster policy goals [in][4]

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[3] In freedom of speech or association cases, the doctrine of facial unconstitutionality due to overbreadth "is predicated on a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain constitutionally protected speech or expression (citations and interior quotation marks omitted)" *Robinson v. State of N.J.*, supra, 806 F.2d at 447. Because the provisions of the Dills Act at issue before the court threaten no sanctions, there is no question of their having a chilling effect on expressive activity and the doctrine of overbreadth is not applicable to this case (*Id.* at 447).

[4] Brackets indicate changes made by Court of Appeal in construing section 3515.8.

> collective negotiations and contract administration, or to secure for employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer . . . " (App. A-31-32).[5]

Petitioners contend that, as construed by the Court of Appeal, section 3515.8 violates their First Amendment rights of freedom of association by compelling them to support lobbying activities that are not "germane to the collective bargaining process". Petitioners err in their reading of this Court's decisions on the subject and in their reading of the decision of the Court of Appeal.

Petitioners' contention relies heavily on tests espoused in *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks, etc.*, 466 U.S. 435 (1984) and *Comm. Wks. of Am. etc. v. Beck*, 487 U.S. 735 (1988), 101 L.Ed.2d 634. However, those cases involve collective bargaining in the private sector. In the public employment sector, the line between permissible and impermissible expenditures is "somewhat hazier" than in the private employment sector. *Champion v. State of California, supra*, 738 F.2d 1082, 1085 (9th Cir. 1984), cert. den. sub nom. *Champion v. Deukmejian*, 469 U.S. 1229 (1985). This is because whether certain fair share fee expenditures are proper depends on the nature of the bargaining process. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 236, n. 33 (1977); *Champion v. State of California, supra*, 738 F.2d at 1086.

The courts recognize "[d]ecision making by a public employer is above all a political process [citation omitted] and . . . related budgetary and appropriations decisions

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[5] App. A refers to Appendix A of the Peition for Writ of Certiorari in this case.

might be seen as an integral part of the bargaining process . . . The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Ellis, supra,* 466 U.S. at 456.

In *Champion,* the Ninth Circuit upheld the *prima facia* validity of section 3515.8 and noted that more legislative matters are involved in state employee-employer relations than merely the approval and funding of the memorandum of understanding.

> "Because public employees work for the state, matters which are ordinarily left to direct negotiation in the private sector are covered by statute. For example, grievance adjustment, California Government Code section 18714; computation of leave when there is a break in service, *Id.* section 19143; the policy of paying female workers on the principle of comparable worth to remedy great discrepancies between male and female workers' salaries, *Id.* section 19827.2(a); the notice and hearing procedure when an employee's salary is changed, *Id.* section 19828; and the use of hourly or day workers, *Id.* section 19830, are provided by statute, but may be changed through negotiation. See generally *Id.* section 3517.6 for a list of statutes affecting public employees. These statutes create a status quo from which the bargaining representatives start negotiations for their particular units. The importance of legislation affecting public employment, enacted in a forum apart from the meet-and-confer sessions authorized by statute, California Government Code section 3517, requires that public employee representatives be given broad authority to protect their members' interests before the legislature."

(*Champion v. State of California, supra,* 738 F.2d at 1086.)

The *Champion* case reveals that, in the public sector, especially at the state level, many of the matters that are resolved through collective bargaining in the private sector are governed by statute and can not be resolved through collective bargaining. Thus petitioners' blithe assertion that the Court of Appeal decision allows the use of the fees of objecting employees to be used "outside the collective bargaining process" (See Pet. p. 12-13), is a distortion of the situation public employee unions face when they wish to improve working conditions and benefits for their members.

Although petitioners contend that the Court of Appeal's construction of the Dills Act is contrary to this court's ruling in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), they fail to heed this court's counsel in *Abood* to avoid the unnecessary and abstract decision of constitutional questions. In *Abood,* this court declined to make unnecessary distinctions of permissible and impermissible union expenditures of fair share funds, in part because the case came before the court after judgment on the pleadings without a factual record.

This court reasoned that, with no evidentiary record, it is difficult, in the abstract, to determine what specific union activities "properly fall under the definition of collective bargaining. The lack of factual concreteness and adversary presentation to aid us in approaching the difficult line-drawing questions highlights the importance of avoiding unnecessary decision of constitutional questions." (*Id.* at 236-237, footnote omitted). Since this case comes before this court in the same posture as *Abood,*

for the same reasons this court should deny the writ to avoid the unnecessary decision of important constitutional questions.

Petitioners also cite *Keller v. State Bar of California*, 495 U.S.___, 110 L.Ed. 2d 1 (1990) as support for their case. However, the Court of Appeal correctly construed *Keller*, finding that:

> *Keller* does not purport to alter the general guidelines for permissible use of compelled contributions. Consequently, it cannot be read to suggest, as plaintiffs would have it, that lobbying reasonably related to the advancement of the union's representation role may not be charged to the objecting nonmembers or that all lobbying must be confined to seeking approval of the memorandum of understanding or related budgetary items. (App. A-39).

Petitioners also err in their second argument where they allege the Court of Appeal failed to follow the guidance of this court in *Ellis* and rendered a decision that fails to survive the level of scrutiny required by the First Amendment.

Their error is that the Court of Appeal decision discussed *Ellis* at length (App. A-23-25, 39-40, 49-50) and correctly applied the *Ellis* test for permissible expenditures for matters "germane to collective bargaining process". What petitioners fail to appreciate is that the Court of Appeal realized that the *Ellis* test for allowable costs envisions not just the costs of the actual bargaining process and costs for approval of the terms of the memorandum of understanding, but also, "whether the challenged expenditures are necessary or reasonably incurred for the

purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." (*Ellis v. Brotherhood, supra,* 466 U.S. at 448, quoted at App. A-24.)

II

THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFUSION IN THE LOWER FEDERAL COURTS REGARDING THE PERMISSIBLE USE OF FAIR SHARE FEES THAT WOULD BE RESOLVED BY THIS CASE

In their third argument, petitioners contend certiorari should be granted to resolve divergent approaches among the federal Courts of Appeals on where the line should be drawn for the permissible use of fair share fees. The petitioners cite only two cases for this argument, both of which fail to support their contention.

The first case they cite is the Sixth Circuit case of *Tierney v. City of Toledo,* 824 F.2d 1497 (6th Cir. 1987). They cite dicta from *Tierney* to the effect that "the exclusive representative may collect only for expenses exclusively related to the bargaining agreement." *Ibid.* at 1505. However, this language was for the benefit of an arbitrator who was to determine what expenses were actually allowable in a particular two year contract (*Ibid.* at 1504-1505). The *Tierney* court's decision does not represent a divergent approach to the problem because the court did not consider the extent to which fair share fees may be used for lobbying related to conditions of employment. It is axiomatic that cases are not authority for matters that were not considered by the court.

The only other case which petitioners cite for a divergent approach is *Hudson v. Teachers' Union Local No.1*, 743 F.2d 1187, 1193 (7th Cir. 1984), where the Seventh Circuit admonished that fair share fees should only be used to defray the costs of the union as the "exclusive bargaining representative". However, with a proper understanding of the role of the exclusive bargaining agent in the public sector, it is clear that there is no divergence of approaches between the Seventh Circuit and the California Court of Appeals' decision which restricts lobbying activities financed with fair share fees to "better terms and conditions for public employment or other **representation related policy goals**" (App. at A-11, emphasis added).

Tierney and *Hudson* are also distinguishable from this case because they involved employees of local government, police officers and teachers, and not employees of state government where the terms and conditions of employment are more likely to be fixed by statute.

The putative divergence of approaches thus disappears with a careful reading of *Tierney* and *Hudson* and an appreciation of the fact that the unions in those cases represented, respectively, police officers and teachers, and not employees of state government where many of the terms and conditions of employment are set by statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: February 27, 1991

Respectfully submitted,

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